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International experience of accounting of the gender relations in criminal law

Abstract: Cultural originality, historical traditions and identity of customs, political and state system and other features of various states of the world exert huge impact on various approach of the legislator in a question of formulation of criminal precepts of law from a position of gender approach. The analysis of international documents regulating questions of application to female persons of punishments despite all democratic character of the provisions testifying about in the whole exclusive attitude towards the woman testifies, nevertheless such relation is based not on the biological nature or their sex, and caused by the social and role status of the woman in society connected with motherhood. It should be noted that from this position a priority task is protection and protection of interests not of female criminals, and first of all children. For this reason the criminal legislation of many foreign states recognizes institute of paternity as absolutely equal with motherhood on the social legal status in this connection mother of the minor child has no advantages over his father.

Keywords: gender relations; gender equality; international legal documents; motherhood; interests of children.

The provisions existing in international legal documents, rules and the principles have to and can be used as a basis and a reference point when developing and using gender approach in the criminal and executive legislation of

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the Azerbaijan Republic. The main international documents always indicate impossibility of violation of equality and inadmissibility of any discrimination to any persons, including by gender. So, in particular, in article 3 of the International Covenant "About the civil and political rights", accepted on December 16, 1966, the obligation of all states is specially emphasized – its participants to provide the right of use, equal for women and men, of all civil and political rights provided in it [12, Art. 291].

According to the Convention of 1979 "About elimination of all forms of discrimination against women", this concept is treated as any restriction, distinction or an exception on sexual character [9, Art. 464]. It is specified in Art. 2 of this Convention that the appropriate legal and other measures are taken for elimination of similar discrimination by the states. At the same time, the special measures aiming at childcare and motherhood shouldn't be recognized as discrimination.

In the Declaration "About Protection of Women and Children in Force Majeure and during Armed Conflicts" adopted on December 14, 1974 it is told about need to provide to women and children the special help and protection as during armed conflicts and military operations they most often stand sufferings and become victims of violence and cruelty [7].

Special position of the woman and the exclusive attitude towards her is emphasized in some other documents speaking about the increased protection of the rights and the interests of women and children, in particular, the conventions "About the Political Rights of Women" (1952) signed in New York; "About nationality of the married woman" (1957); "About consent to marriage, age of consent and registration of marriages" (1962) and others [13, p. 168]. Nevertheless, in these documents it is emphasized that this situation is based only on motherhood as a special social role of the woman.

For the first time the UN has declared the commitment to the principle of equality of women and men in the main document – to the Universal Declaration of Human Rights on December 10, 1948 which has proclaimed that "All people are born free and equal in the advantage and the rights" [4]. During this post-war period, the international community recognized gender equality as one of the most important factors of stability in the world. After that the UN has accepted more than one hundred documents devoted to questions of ensuring gender equality, in particular, in 1949 – the Convention on fight against human trafficking and with operation of prostitution by the third parties; in 1952 – the Convention on the political rights of women; in 1960 – the Convention on fight against discrimination in the field of education; in 1966 – International Covenants on Economic, Social and Cultural Rights; in 1979 – the Convention on elimination of all forms of discrimination against women and other important documents.

Announced in 1975 by UN "Decade of Women" it has been opened by the First world conference, which has taken place in Mexico City about position of women. The conference has made the decision on development and adoption of the Convention on elimination of all forms of discrimination against women.

The Second World Conference on Women, which has taken place in 1980 in Copenhagen, has been devoted to development of actions on the second half "decades of women". The third World conference held in 1985 in Nairobi under the slogan "Equality, Development, World!" has summed up the results of "decade of women" and has accepted the document which has received the name "Perspective Nairobi Strategy" which main subject – female and male equality.

In 1993 in Vienna at the World conference on human rights one more important document in the sphere of gender equality – the Vienna Declaration and the Action program has been accepted.

The fourth World Conference on Women has taken place in 1995 in Beijing. Documents – "The Beijing declaration" and "The platform of actions" became its

result. Nevertheless, at this conference the idea of parity equality according to which participation of representatives of each floor in state bodies should be carried out on a parity basis – 50% for 50% hasn't received the fixing.

Change developed in the society of customs and traditions represents very difficult and disease process demanding persistence and patience. At the same time, in a number of the countries of the world government structures have seriously treated the recommendations of the Beijing conference and by means of practical measures and special regulations have made attempts to eliminate the imbalance existing in a social status of women and men in the countries. One of the last is the law "About Parity between Women and Men" adopted in 2000 by National assembly of France.

One more very important document in the field of gender equality is the document of the Council of Europe developed in 1998 by Department of equality problems between men and women under the name "A Integrated Approach to a Problem of Equality of Women and Men". This document expands approaches to a problem of gender equality and acquaints with positive experience in this regard of a number of the states – Portugal, New Zealand, Sweden, and Denmark [5].

As the analysis of the norms which are contained in the international documents regulating questions of application to female persons of punishments despite all democratic character of the provisions testifying about in the whole exclusive attitude towards the woman testifies, nevertheless such relation is based not on the biological nature or its sex, and caused by the social and role status of the woman in society connected with motherhood. In all other cases the international law doesn't allow any privileges to subjects of socially dangerous acts.

It should be noted that from this position a priority task is protection and protection of interests not of female criminals, and first of all children. For this reason the criminal legislation of many foreign states recognizes institute of

paternity as absolutely equal with motherhood on the social legal status in this connection mother of the minor child has no advantages over his father. From this point of view absolutely reasonable should recognize existence in UK of the Azerbaijan Republic norms on a serving sentence delay to the pregnant women and persons having juvenile children (Art. 79 of Criminal Code of AR) and also about responsibility for violation of labor rights of the pregnant woman or woman having dependent on children and the man who is independently bringing up the child aged up to three years (Art. 164 of Criminal Code of AR). Especially visually, this requirement is traced in the international documents of penitentiary value. So, "The minimum standard rules of treatment of prisoners" demand separate keeping of the imprisoned men and women. As for the condemned women, it is noted that in women's criminal and executive institutions there have to be special rooms for keeping of pregnant women and women in labor. At the same time, if the child has been given birth in prison, then about it isn't necessary to specify in the birth certificate (Art. 23). Also the possibility of creation of a day nursery for the children remaining with mothers who are in prison is provided [14, p. 70-79].

In 1995 Azerbaijan has joined the Convention of the UN on elimination of all forms of discrimination against women. In this regard the fact, the State committee on problems of family, women and children provides each four years the report on the work done in the republic in the sphere of ensuring gender equality in the UN. Information on the realized projects concerning various components a gender issue is provided in these reports. In particular, special attention is paid to such questions as trafficking in women, domestic violence, employment of women and men and some other [3].

At the same time the problems taking place in the field have found the reflection in some international reports. So, according to the report of the World Economic Forum under the name "Global Gender Inequality — 2012", the Azerbaijan Republic according to the index of gender inequality has borrowed

among 135 states - the 84th place in education, the 113th place in political participation and the 74th place in economy [6].

In 2006 in the Azerbaijan Republic the Law "About Ensuring Gender Equality" which contains the priority directions of state policy in the sphere of ensuring gender equality has taken effect. Basic provisions on creation, improvement and further development of the normative legal acts providing gender equality, to implementation of gender examination of standard and legal base and also creation and implementation of state programs of respect for gender parity, by conducting gender examination of all in 2010 in the republic the Law "About Prevention of Domestic Violence" in which the package of measures, carried out for the purpose of prevention of the domestic (family) violence committed by close relatives and also present or former cohabitants is provided has been adopted. The obligation of appropriate authorities of the government and management on elimination of negative social consequences of domestic violence, the organization of protection of victims, rendering legal and other aid to them and also elimination of the circumstances leading to domestic violence is provided in the law. On the basis of this law practice of issue of the security warrant by the victim which is used as the document on the restrictions applied for prevention of possible violent acts of the person in the sphere of the family relations and also for assistance to the victim [2].

Cultural originality, historical traditions and identity of customs, political and state system and also other features of various states of the world exert huge impact on various approach of the legislator in a question of formulation of criminal precepts of law from a position of gender approach. To one of the most important and significant factors influencing the relation of society to a question of a social role and value of legal status of the persons by gender which are shown in criminal precepts of law the religious policy of public authorities is. Respectively, in the Muslim countries where the religion is a basis of formation of precepts of

law, and religious way – norm of life, gender distinctions have received the legislative fixing.

By the legislation of the Muslim states where the sexual relations belong to very scrupulous problems and crimes against honor are regulated not only by initial resolutions, in particular, rape or the sexual intercourse by mutual consent is recognized as the crime committed against morality. At the same time the important role belongs to breeding consciousness, severe customs and traditions and also Moslem doctrine – Islam forbidding the illegal sexual intercourses. Along with it such crimes are very difficult as sentences on them significantly differ on the severity, at the same time the particularly important becomes time factor and also speed of dissemination of data on the committed crime among the population.

It is necessary to specify the so-called level of feminization of society as the following important factor exerting impact on implementation of gender policy in criminal law. It is necessary to understand as this concept which is ambiguously interpreted by various authors, according to us, extent of realization and a possibility of implementation in concrete society of the rights and legitimate interests by representatives of various floors.

The traditions which have developed in the right belong to the third factor influencing features of manifestation of gender approach in the criminal legislation. Often the old standard provisions fixed in criminal law don't undergo necessary analytical testing from a position of their expediency, validity and need of repeated establishment for the new criminal law. In other words, it is tradition of continuity, transfer from generation to generation of the provisions and establishments, which have become habitual and repaid in practice.

From the point of view of gender approach, in our opinion, consideration of the criminal legislation of the certain states is of interest. In the Muslim criminal legislation, gender contradictions have the most expressed character. So, by the Iranian legislation criminal liability comes for boys at the age of 14 years and 7

months, and for girls — 8 years and 9 months. Feature of the criminal legislation of Iran is existence in him along with directly criminal and legal, also criminal procedure and criminal and executive norms. So, article 102 of the Law on Islamic criminal penalties of the Islamic Republic of Iran, providing an order of execution of the punishment in a look a beating by stones, specifies that the punishable male has to be dug to the earth on a belt, and the punishable female person – up to a breast [8, p. 84]. At the same time, article 91 of the same Law provides that rated punishment in the form of the death penalty as beating by stones to the woman in a condition of pregnancy and during childbirth and right after childbirth if the newborn has no trustee and there is fear for his life [8, p. 80]. Respectively article 92 of the same Law establishes that if rated sentence in the form of castigation imposed to the woman in a condition of pregnancy or the period of feeding by a breast, can do harm to health of a fruit or the baby, his execution is postponed until the danger of infliction of harm is eliminated [8, p. 81].

By the Polish criminal legislation the concept of the subject of rape is designed in such a way that not only the man, but also the woman can be recognized by him. The instruction on sex of the subject of crime is provided in a small number of articles of the Criminal code of Poland: in article 152 (§ 2), article 153 which speaks about termination of pregnancy in defiance of instructions of the law, article 154 providing the death of the pregnant woman as a result of abortion, article 157 (§ 3) where it is indicated a possibility of release of the pregnant woman from responsibility in case of careless causing to an injury fruit [15, Art. 152].

Unlike of Criminal code of Poland the Criminal code of Switzerland is characterized by more various manifestation of gender approach. So, article 190 speaks about violent compulsion of the female person to cohabitation. The norm provided in article 215, providing responsibility for polygamy at the same time

guilty is very interesting of commission of this crime it can be found both the man, and the woman [16].

Gender problems not only are various in separate cultures, but also changes of these representations substantially depend on ideas of society of morals, the sexual relations. If from the point of view of law any phenomenon was considered as crime (for example, violation of marital fidelity), then today it, perhaps, and is considered as an aberration, but isn't crime any more. Considering the changed installation of society on a problem of the sexual relations, the legislator of Germany with adoption of the first Law on penal reform of 1969 has excluded from UK such norms as violation of marital fidelity, simple homosexuality, bestiality and inducement to cohabitation by deception. With adoption of the fourth Law on penal reform of 1973 the fresh wording in UK was received by many structures about sexual crimes entering the section "Criminal Actions against Sexual Integrity" (§ 174-184).

During reform the legislator of Germany recognized a message that the behavior of the person can't be strictly punished only for the fact that it is immoral, it has to be punishable if the fundamental interests of other persons or society in general are violated [10, p. 222]. At the same time not all acts having sexual focus belong to sexual crimes but only those which are directed to satisfaction of the or other person of sexual requirement, breaking thereby the standard norms of intersexual communication. However if public norms which don't belong to social statutes about sexual actions are broken, then in these cases it is about sexually motivated crime.

The separate provisions of UK of Bulgaria regulating crimes against sexual freedom are of interest. Therefore, article 191 of this UK provides responsibility both men, and women for inducement of the minor of any floor to the introduction in the matrimonial relations without marriage [17, p. 137].

It is necessary to refer establishment of criminal punish ability of "criminal violation of national and racial equality, restriction of human rights" to advantages of UK of Latvia. UK of Latvia also, as well as acts of other states provides responsibility for murder of the newborn child by mother (exclusive structure) (Art. 119), illegal production of abortion (Art. 135) and coercion to production of abortion (Art. 136) [18]. It should be noted that the norm on responsibility for coercion to production of abortion isn't provided in the criminal legislation of Azerbaijan that perhaps should be considered as the gap in the legislation needing elimination as this crime encroaches on such important right of the woman as the right for motherhood.

In the Criminal legislation of Republic of Belarus, according to the Belarusian scientists, the idea of gender equality hasn't received the due fixing. Such situation speaks not only long isolation of legal system from democratic transformations, but also insufficient knowledge of the legislator in this sphere [11].

Very fair, humane and expedient measure the possibility of liberation provided in Criminal Code of Ukraine from serving sentence of the pregnant women and women having children under three years [19] is represented to us. We believe possible introduction of this institute and to Criminal Code of Azerbaijan as one of the bases of release from criminal penalty for commission of less serious crimes, or the crimes that don't constitute big public danger.

It should be noted that recently at application of gender approach the woman is investigated not only as the subject of crime, but also as the victim from crimes. At the same time researchers note very remarkable tendency of increase in cases of use of violence to women and obvious deterioration of the situation of the women and children suffering from family violence.

The conclusions received as a result of the carried-out comparative analysis can be formulated as follows:

1) As in international legal documents, and the foreign criminal legislation the discrepancy in gender approach is traced – as exclusive sign the social and role status of the woman is considered, but the interests of juvenile children aren't considered;

2) Ambiguous approach to establishment in criminal law of gender distinctions is observed. In one cases they are minimized (Criminal Code of Poland), in others are absent completely (Criminal Code of Switzerland); in the third case – have rather declarative character (Criminal Code of Latvia).

At the same time, separate provisions of the criminal legislation of some states are submitted to us deserving attention and support. So, in particular, very successful decision we believe norm on release from punishment of some categories of the female criminals having juvenile children (Criminal Code of Ukraine) and also we suggest to add Criminal Code of Azerbaijan Republic with norm on criminal liability for coercion to production of abortion as it takes place in Criminal Code of Latvia.

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